

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Inquiry Regarding Broadband	)	WC Docket No. 07-52
Industry Practices	)	
	)	

**COMMENTS OF THE  
INTERNET FREEDOM COALITION**

The Internet Freedom Coalition is a group comprised of 30 like-minded free-market, limited government non-profit associations, individuals and think-tanks.<sup>1</sup> The Internet Freedom Coalition respectfully submits the following comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) Notice of Inquiry (“NOI”) in the above-captioned proceeding.<sup>2</sup> Our interest in this proceeding issues from a common conviction that the institutions of property and contract, properly understood, and the markets they make possible, serve the public good better than prescriptive regulation. This is not to say we do not believe in regulation where warranted. However, both economic scholarship and historical experience support the principle that free markets developing without government intervention best serve the public and society. As President Reagan once said, “There are no constraints on the human mind, no walls around the human spirit, no

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<sup>1</sup> Internet Freedom Coalition. <http://www.internetfreedomcoalition.org>.

<sup>2</sup> *Inquiry Regarding Broadband Industry Practices*, WC Docket 07-52, Notice of Inquiry, FCC 07-31 (released April 16, 2007) (“NOI”).

barriers to our progress except those we ourselves erect.” At this point and on this record, there is no basis to erect regulatory barriers around the Internet or constraints on the innovation and investment that broadband makes possible.

Calls for net neutrality regulation of the Internet are premature at best, and innovation and investment killers at worst. The Commission should categorically reject calls for regulating the Internet in the name of net neutrality, while remaining vigilant about legitimate competition policy concerns surrounding broadband markets.

## **1. Background**

The NOI gives the Commission the opportunity to categorically reject prescriptive “net neutrality” regulation of the Internet. For a variety of reasons -- some content-driven, some politically-driven, some taxation-driven -- governments seem simply unable to resist the temptation to regulate the great engine of human innovation, creativity and freedom: the Internet. Yet, under both Republican and Democrat administrations, the Commission has steadfastly resisted the temptation to regulate the Internet. The ideal outcome of this NOI would be for the Commission to reaffirm the principle that market-driven, unregulated broadband platforms are optimal for consumers, innovation and investment.

Net neutrality has emerged as one of the most contentious communications and media policy issues of this era. Rhetorical restraint and honest debate have been displaced by the cataclysmic prediction that, without prompt regulatory action, this will be “the end of the Internet.” In a broad sense, then, this NOI is a reaction

to sentiment in certain academic and activist quarters that is typified by overheated doomsday predictions about the future of the Internet.<sup>3</sup> To those academic theorists, the Internet can only remain a dynamic platform for sharing, innovation and creativity if a centralized regulator intervenes to prescribe behavioral and structural rules for permissible practices. This centralizing regulatory impulse not only cuts against the essential decentralized and organic nature of the Internet, but also threatens to stifle innovation and investment in broadband platforms. Furthermore, the Internet as we know it today, in all of its complex and innovative aspects, has flourished because the government has not regulated in this area. Simply put, it is a bad idea to regulate a dynamic market with contours we have barely begun to understand.

The Commission seeks in this proceeding to enhance its “understanding of the nature of the market for broadband and related services” and to “ask whether any regulatory intervention is necessary.”<sup>4</sup>

We confine the remainder of our comments to the latter question, and reduce it to its simple statement: “Why regulate?” There is no positive evidence of the need for a wholly new and untested regulatory regime to solve phantom concerns of net neutrality proponents. To the contrary, existing competition policy principles applied by this Commission and the Federal Trade Commission (FTC) suffice to

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<sup>3</sup> MoveOn.org, “Save the Internet” campaign petition, at [http://civic.moveon.org/save\\_the\\_internet/](http://civic.moveon.org/save_the_internet/), viewed on May 9, 2007. The opening statement on the site states, “Congress is now pushing a law that would end the free and open Internet as we know it.”

<sup>4</sup> *Inquiry Regarding Broadband Industry Practices*, WC Docket 07-52, Notice of Inquiry, FCC 07-31 (released April 16, 2007).

address any prospective future harm to consumers that may legitimately concern net neutrality proponents.

## 2. Myths Regarding Net Neutrality

### A. *Myth #1 – There is a “problem.”*

One does not have to read the entire NOI to find the most poignant question in this inquiry. In the first paragraph, the NOI states, “we ask whether any regulatory intervention is necessary.”<sup>5</sup> In order to answer this question, the Commission must ask itself, “What is the problem?” or, in this case, “Is there a problem?” The irony of this NOI is that a problem does not currently exist, and no party credibly contends that point. Historically, given the billions of transactions that have taken place on the Internet, there is only one incident or case regarding abuses with respect to network providers, or other parties, blocking legal content or participating in anticompetitive behavior.<sup>6</sup> Quite to the contrary, it is implicitly, often times explicitly, stated that there have been no real reported abuses to date.<sup>7</sup> Therefore, before embarking on a “Save the Internet” campaign, let’s be clear: this NOI is born out of unproven and unfounded fears that anticompetitive behavior by some unspecified bad actors *might* happen at some undetermined time. Yet in the

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<sup>5</sup> *Id.*

<sup>6</sup> *Madison River Telecommunications, LLC v. BellSouth Telecommunications, Inc.*, File No. EB 05-IH-0110, Consent Decree, DA 05-543 (“Consent Decree”), and File No. EB 04-MD-007, Order, DA 04-2078 (released July 12, 2004) (“Order”). The Madison River case is used and abused as an example of the need for net neutrality regulation. However, it is important to point out that *existing regulation* forbids that behavior. Moreover, anticompetitive behavior to prevent cannibalization of one’s own monopoly platform is a hallmark prohibition of competition law as evidenced both by Madison River and the Microsoft antitrust complaint.

<sup>7</sup> *Id.*

nearly five years since activists began calling for “net neutrality” regulation, there have been no reports of anticompetitive behavior or blocking access to legal content.<sup>8</sup> The ever-changing and dynamic nature of the Internet, including broadband networks, applications and devices, and the Internet’s ability to further change the world we live in, demonstrates how complex and limitless the issues, problems, and solutions are. Regulation at this point will shortchange the ability of network providers, content companies, applications providers and other innovators to collectively resolve the market imperfections and avoid the costly, uncertain and untimely nature of regulation. If there is ever an argument for reduced or no regulation, compare the success of the wireless industry with the long-delayed emergence of competition in landline phone services – the former industry was substantially regulated, the latter was regulated with the intent of “stimulating competition,” which of course did not happen.

***B. Myth # 2 – The Commission needs to regulate net neutrality now.***

The follow up to “why regulate” is temporal: “Why regulate now?” If there are no abuses, what is the Commission going to regulate? Net neutrality proponents would have the Commission regulate against prospective harms touted by certain academic theoreticians.<sup>9</sup> But prudence and due deference to the experience that regulation has unintended consequences, even when a problem or

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<sup>8</sup> Net Neutrality Scare Ticker, a project of the Internet Freedom Coalition, <http://www.netneutralityscareticker.com>.

<sup>9</sup> Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

issue is universally acknowledged, should surely give pause before a wholesale effort to regulate the Internet is undertaken. Given that technological innovation and advancements always outpace regulation and legislation, how can the Commission or Congress realistically believe that they have the ability to proactively resolve future issues and problems currently not in existence? A little humility and honesty about the limitations of proactively regulating, and looking to past experiences such as open network architecture (ONA) rules, unbundling mandates, and forced ISP access to cable platforms, counsels caution about leaping headlong into regulation of markets that are just developing and are poorly understood. There is no rush to regulate, and the Commission will be better served by allowing consumers and businesses, acting in the free markets, to work out proper business models in emerging broadband markets.

Indeed, consumers appear to be zealous guardians of their desire for a ‘neutral’ ‘Net. Business models that involved ‘walled gardens’ like AOL and CompuServe, gave way in the early days of the dial-up Internet boom. There is no evidence, *pace* net neutrality enthusiasts, that consumers want those days to return. To the contrary, recent years have only seen higher broadband speeds, lower broadband prices and innovative content and applications that consumers demand.<sup>10</sup> The Internet is not “less neutral” or “being controlled” by network providers. The Internet is driven by consumers’ demands. Still, the Commission

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<sup>10</sup> *Notice of Proposed Rulemaking Regarding Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket 07-38, Notice of Proposed Rulemaking, FCC 07-17 (released April 16, 2007).

should be solicitous of business models that allow bandwidth-tiering and the development of two-sided markets that lower costs to consumers and make broadband packages more attractive. Such innovation would be the market at work, and net neutrality threatens to stifle such innovations.

***C. Myth # 3 – Network Providers will start discriminating, and will undertake anticompetitive behavior, unless the Commission regulates now.***

One of the fundamental problems with the arguments by the pro-net neutrality camp is the inability of anyone to define what constitutes “discrimination” without condemning, or at least making suspect, all forms of market differentiation. There are good, legitimate and consumer beneficial forms of “discrimination” in broadband markets. Theoreticians can also concoct “bad” forms of discrimination in these markets. But a “simple rule,” as preferred by proponents of regulation, risks sweeping the good in with the bad, hence chilling business innovation and investment.

Indeed, there is good reason to believe that a net neutrality mandate will actually weaken the competitive vibrancy of the content, applications and device components of the Internet. One of the great public misperceptions in this debate is that any form of discrimination is bad and should be prevented. However, for all its flexibility, the Internet cannot possibly be all things to all users. For example, Internet protocols (e.g., TCP/IP) route packets of digitized data over the Internet anonymously on “first come, first served” and “best efforts” bases. This approach works well for applications or related devices that are not time or latency-sensitive.

This approach, however, works poorly for uses that depend on a steady transfer of data over networks, such as streaming media -- including Internet delivery of high-definition television, online gaming and even Voice-over-IP.<sup>11</sup> For example, if a person is having a VoIP conversation, the digitized packets of information are given priority so the conversation is not interrupted by long delays or having bits and pieces of their conversation received out of order while another person, who is downloading a song, may experience a minuscule and hardly detected delay. Is this the “discrimination” the Commission or Congress is trying to, or should, prohibit? Are all digitized packets equal? Does the Commission actually have the kind of resources that would be needed to police such a mandate? The honest answer is we do not know, and proper humility towards market development should incline us to adopt a wait-and-see approach.

The simple fact is that discrimination takes place -- and *must* take place -- for consumers to experience their current level of satisfaction and service through the Internet. Therefore, assuming the Commission and Congress fully understands the sensitivities and complexities in delivering digitized packets, in order to preserve consumers’ current level of expectations with regard to experience and services, the question then becomes, can the Commission or Congress adequately define “discrimination” in a meaningful way that does not lead to extensive legal battles that devour time and money prior to enforcement? Sadly, once the Commission or Congress steps into this regulatory or legislative mess, “discrimination” is not the

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<sup>11</sup> Christopher S. Yoo, Beyond Network Neutrality, Vanderbilt University Law School, Public Law and Legal Theory (Working Paper No. 05-20), Law & Economics (Working Paper No. 05-16), available at <http://ssrn.com/abstract=742404> (visited Feb. 1 2006), at 5.



only technical term that may require intense scrutiny. Consider for a moment a few of the other definitions and Internet technologies that the Commission and/or Congress may have to define to create “neutrality”: caching, collocation, packet disassembly and assembly, settlement-free interconnection, network access points, Internet protocol systems.<sup>12</sup> If there is any doubt as to the political or legal ramifications and consequences in how a particular term or technology is defined, look no further than the *National Cable & Telecommunications v. Brand X Internet Services* decision.<sup>13</sup>

In accordance with the technical terms and consequences noted above, another major issue with regulating net neutrality is who exactly is going to be regulated or held to this “nondiscrimination” policy mandate? Will it be limited to those who build and operate physical broadband networks, or will it extend to other layers of the Internet, such as content and application providers? If the Commission or Congress demands that “openness” and “neutrality” are the base level for participation, then all actors and contributors at all layers must be included under this regulatory framework; otherwise the Commission and Congress will be indirectly or directly picking technology winners and losers.

***D. Myth # 4 - Net Neutrality is good for consumers and will not cost them anything.***

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<sup>12</sup> “Debunking the Myths of Net ‘Neutrality,’” by Chuck Muth, Human Events, June 22, 2006, at <http://www.humanevents.com/article.php?id=15704>.

<sup>13</sup> Nat’l Cable & Telecomm. Assn. v. Brand X Internet Services, Sup. Ct. Docket No. 04-277 (June 27, 2005). The Supreme Court held that cable Internet service is defined as an “information service” and not a “telecommunication service.”

Everyone agrees that “openness” on the Internet is a good thing in the sense that consumers benefit from expanding levels of competition and innovation that the Internet’s technical architecture makes possible. There are several interwoven components to the Internet experience – content, applications, and services, “smart” devices and broadband networks like those that provide DSL and cable modem service. Consumers need competition and innovation with respect to all of these components. And most proponents of net neutrality regulation welcome increased competition and innovation in the “last mile” broadband networks, though some would be happy with a government owned and operated “big broadband” monopoly. Thus, it is sadly ironic that net neutrality regulation could stymie the investment that is necessary to foster such competition and innovation.

The proper role for government in this debate is the one it has played with respect to many other industries, including communications: preserving and promoting competition. Calls for net neutrality regulation largely are based on the fear that competition among “last mile” broadband networks is inadequate to prevent owners of such networks from denying consumers or companies trying to reach them fair and even-handed use of the networks. Particularly given that broadband providers continue to vie for customers on the bases of price, speed and other features, policymakers should ask whether this fear is justified and, if so, whether net neutrality rules are the best way to address the underlying competitive concern.

While companies are spending tens of billions of dollars to deploy cutting edge technologies with respect to broadband networks, services, and applications, net neutrality regulation could severely undercut those efforts to the detriment of consumers. “Federal ‘neutrality’ regulations would undercut virtually all types of commercial arrangements between Internet access providers and online companies. With this major source of revenue dried up, providers would have only one place to turn: Consumers.”<sup>14</sup> Two-sided markets emerge everywhere in our economy from “free” advertiser-supported TV and radio, to Google’s advertising placement business, to WalMart’s receipt of “placement premiums” for products. Net neutrality in most flavors would preempt and ban the emergence of two-sided markets in broadband.<sup>15</sup> Premature regulatory schemes will fundamentally alter the private markets by negatively impacting technological innovation, and limiting the business development models that would be responsible for capital input in all facets of broadband networks.

### **3. Conclusion**

Net neutrality is a premature regulatory initiative. There is little evidence, or reason to believe, that these interdependent Internet players cannot reach commercial agreements on whether they pay one another, and who pays whom – or

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<sup>14</sup> “Debunking the Myths of Net ‘Neutrality,’” by Chuck Muth, *Human Events*, June 22, 2006, at <http://www.humanevents.com/article.php?id=15704>.

<sup>15</sup> A strong net neutrality mandate aimed at all levels of the Internet would basically outlaw Google’s business model of free search being paid-for by advertisers. This is a most un-neutral platform, giving preference to those who pay over those who do not. Of course, consumers benefit greatly from the terrific product Google makes available for free because of its non-neutrality. The point is that we do not know the optimal structure for broadband markets, and should not be banning business models out of an academic-aesthetic preference for how the world should work.

if anyone pays anyone else at all. Contrary to its proponents' beliefs, net neutrality will have definite effects on the level of investment and innovation on the Internet. Net neutrality will forbid potentially promising business models that lower costs to consumers. Furthermore, a mandate will effectively advantage non-latency-sensitive Internet innovations over latency-sensitive ones like voice and video. Net neutrality proponents fail to fully comprehend the complexity and slippery slope of initiating regulatory solutions, especially where no problems have been found to exist. Finally, the logic of network neutrality regulation will not confine itself to just physical broadband networks, but must inevitably extend to interoperability, access, and "openness" mandates on all types of applications – VoIP services, IM services, social networking, search engines, online commerce, and so on. The logical progression of net neutrality regulation would be an encompassing Internet-regulation regime, extending to both price and content. This would be bad for consumers, and bad for the expansion of broadband markets in the United States.

We began our comments with a statement of our principles that property and contracts in free markets best serve citizens absent a clear and persistent market failure. Net neutrality as an Internet regulation scheme fails on this last account, and will be a potentially catastrophic substitute for a free, open market. The Commission should use this NOI to reaffirm its commitment to an unregulated Internet.

Sincerely,



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